Filed 2/14/19 P. v. White CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. LOUIS C. WHITE, Defendant and Appellant.	B288048 (Los Angeles County Super. Ct. No. TA032968)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

California Appellate Project, Jonathan B. Steiner and Richard B. Lennon, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Steven E. Mercer and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

In 1995, appellant Louis White was convicted of possession of a firearm by a felon and sentenced to an indeterminate term of 25 years to life in state prison pursuant to the "Three Strikes Law" (Pen. Code,[1] §§ 667, subds. (b)-(j), 1170.12). In 2012, White petitioned for recall of his sentence under the Three Strikes Reform Act of 2012 (§ 1170.126), enacted by the California electorate as Proposition 36. The trial court denied the petition, finding White ineligible for relief because he was armed with a firearm during the commission of the offense. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. White's Third Strike Conviction

On the day of the alleged offense, Los Angeles Police Officer Christopher Paredes was in his police vehicle when he saw White walking toward him. White was carrying a black jacket in both hands, which seemed to conceal a long rigid object. A portion of the object was protruding from under the jacket, and Officer Paredes could see that it was a shotgun barrel. Office Paredes also observed that White was holding the shotgun in a manner that would allow him to depress the trigger from outside the jacket with a quick motion. Fearing White could shoot him, Officer Paredes drew his firearm, pointed it at White, and ordered him to drop the weapon. White complied, and placed the shotgun on the ground. An examination of the shotgun revealed that it was loaded.

In 1995, White was charged with, and convicted of, possession of a firearm by a felon in violation of section 12021,

---

1 All further statutory references are to the Penal Code.

subd. (a).[2] The allegations that White had two prior serious or violent felony convictions were found to be true. White was sentenced to an indeterminate term of 25 years to life in state prison pursuant to the Three Strikes Law.

II. White's Petition for Recall of Sentence

On November 28, 2012, White filed a petition for recall of his sentence and resentencing under Proposition 36. The People opposed the petition, arguing that White was ineligible for resentencing because he was armed with a firearm during the commission of the offense. The People also asserted that White was unsuitable for resentencing based on his criminal history and his conduct in prison.

On December 18, 2017, following an eligibility hearing, the trial court denied the petition. The court found that White was statutorily ineligible for relief under Proposition 36 because he was armed with a firearm during the commission of the offense. White timely appealed.

DISCUSSION

I. Overview of Governing Law

Proposition 36, approved by the California voters in November 2012, amended the Three Strikes Law's sentencing scheme. (*People v. Frierson* (2017) 4 Cal.5th 225, 229.) Prior to the approval of Proposition 36, the Three Strikes Law imposed a prison term of 25 years to life for a felony conviction where the defendant had two or more prior convictions for a serious or

---

[2] The statute has since been renumbered as section 29800, subdivision (a).

violent felony. (Former § 1170, subd. (c)(2)(A); see *People v. Estrada* (2017) 3 Cal.5th 661, 666 (*Estrada*).) Following the enactment of Proposition 36, "defendants are now subject to a lesser sentence when they have two or more prior strikes and are convicted of a felony that is neither serious nor violent, unless an exception applies. [Citations.] One such exception is if, '[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.' (§ 1170.12, subd. (c)(2)(C)(iii).)" (*Estrada*, *supra*, at p. 667.)

Proposition 36 also added section 1170.126, which permits inmates currently serving an indeterminate term under the original Three Strikes Law to petition for recall of their sentence, and, if eligible for relief, to be resentenced to the term that would have been imposed for their offense under the new sentencing provisions. (§ 1170.126, subds. (a), (b).) "The procedures call for two determinations. First, an inmate must be eligible for resentencing. (§ 1170.126, subd. (e)(2).) An inmate is eligible for resentencing if his or her current sentence was not imposed for a violent or serious felony and was not imposed for any of the offenses described in clauses (i) to (iv) of section 1170.12, subdivision (c)(2)(C). (§ 1170.126, subd. (e)(2).) Those clauses describe certain kinds of criminal conduct, including the use of a firearm during the commission of the offense. Second, an inmate must be suitable for resentencing. Even if eligible, a defendant is unsuitable for resentencing if 'the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.126, subd. (f).)" (*Estrada*, *supra*, 3 Cal.5th at p. 667.)

II. White Is Not Eligible for Relief Under Proposition 36

White asserts the trial court erred in denying his petition for recall of his sentence based on Proposition 36's exception for a defendant who was armed with a firearm during the commission of the offense. White argues the exception only applies when the arming has a facilitative nexus to the underlying offense, or is tethered to an underlying offense other than possession of a firearm by a felon. As White acknowledges, however, this argument has been repeatedly rejected by the courts.

"'"[A]rmed with a firearm" [or weapon] has been statutorily defined and judicially construed to mean having a firearm [or weapon] available for use, either offensively or defensively. [Citations.]' [Citation.]" (*People v. Cruz* (2017) 15 Cal.App.5th 1105, 1109-1110; see *People v. Perez* (2008) 4 Cal.5th 1055, 1065 ["'armed' means having a "weapon available for use, either offensively or defensively"]; *People v. Bland* (1995) 10 Cal.4th 991, 997 ["[a] defendant is armed if [he or she] has the specified weapon available for use, either offensively or defensively"].) "'It is the availability—the ready access—of the weapon that constitutes arming.'" (*People v. Bland, supra,* at p. 997.)

Based on this principle, appellate courts uniformly have held that an inmate is ineligible for relief under Proposition 36 if he or she was convicted of being a felon in possession of a firearm, and the evidence demonstrated that the firearm was available for use, either offensively or defensively. In so holding, these courts also consistently have rejected the argument that there must be a facilitative nexus between the arming and the possession of the firearm, or that the arming must be tethered to another offense. (*People v. Cruz*, *supra*, 15 Cal.App.5th at p. 1111 ["[a]rming 'requires a temporal nexus between the arming and the

underlying felony, not a facilitative one,'" and "'[a] defendant is armed if the defendant has the specified weapon available for use, either offensively or defensively'"]; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283, 284 [rejecting argument that "there must be an underlying felony to which the arming is 'tethered,'" and concluding that Proposition 36 "disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm"]; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 797 [rejecting claim that "one cannot . . . be armed with a firearm . . . without another separate or tethering offense," and holding that, "[w]here . . . the record shows that defendant convicted of possession of a firearm was armed with the firearm during the commission of that offense, the armed with a firearm exclusion applies"]; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1034, disapproved on another ground in *People v. Frierson*, *supra*, 4 Cal.5th at p. 240, fn. 8 ["being 'armed with a firearm' . . . for purposes of [Proposition 36], does not require the possession be 'tethered' to, or have some 'facilitative nexus' to, an underlying felony"]; *People v. White* (2014) 223 Cal.App.4th 512, 527 [rejecting contention that "the arming [must] be . . . tethered to an offense which does not include possession,'" and holding that the armed-with-a-firearm exception applies "where . . . a defendant convicted . . . of possession of a firearm by a felon was armed with the firearm during the commission of that offense"].)

We agree with the above-cited cases that Proposition 36's eligibility exception for a defendant armed with a firearm during the commission of the offense applies to the underlying offense of possession of a firearm by a felon where the record establishes that the firearm was available for offensive or defensive use by the defendant. In this case, the record clearly demonstrates that

White was armed with a firearm during the commission of the underlying offense given that he was holding a shotgun in his hands when he was sighted by the police. Because White was ineligible for resentencing under Proposition 36, the trial court did not err in denying his petition.

DISPOSITION

The order denying the petition is affirmed.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.